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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,
Petitioners,

v.

THE CITY OF NEW YORK,
Respondent.

BRIEF *AMICUS CURIAE* OF HACKENSACK WATER COMPANY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Hackensack Water Company ("Hackensack") hereby submits its brief *amicus curiae* in support of the Petition for a Writ of Certiorari, filed on April 18, 1980 by Petitioners Lloyd F. and Eloise Canfield in the above-captioned matter, seeking reversal of a judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 25, 1980.

In accordance with this Court's Rule 42, Hackensack Water Company has received the written consent of counsel for both parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 606 F.2d 358 and is set forth in Appendix C to the Petition for a Writ of Certiorari. The opinion of the United States District Court for the Southern District of New York, which was reversed by the Court of Appeals, is reported at 450 F. Supp. 846 and appears in Appendix A to the Petition for the Writ of Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Does an allocation of river flow between upstream and downstream riparian states by an equitable apportionment decree of the Supreme Court cut off the right of private owners of riparian lands in the downstream state to receive just compensation for damage to their riparian lands caused by diversions in the upstream state?

Constitutional Amendments and Statutes Involved

The Fifth Amendment to the United States Constitution provides in part that:

> "nor shall private property be taken for public use, without just compensation."

The 14th Amendment provides in part that:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The statutes involved are referred to in the Petition for Writ of Certiorari at pp. 3-4.

Interest of Hackensack Water Company

Hackensack provides water service to homes, businesses, and industry in 60 communities of northern New Jersey's populous Bergen and Hudson Counties. Spring Valley Water Company, a wholly owned subsidiary of Hackensack, serves most of Rockland County, New York. More than one million people live in the 282 square mile service areas of the two companies. Most of the water supplied to these consumers is drawn from the Oradell Reservoir in New Jersey, the Lake Tappan Reservoir which straddles the state line, and the Deforest Lake Reservoir in New York. These reservoirs are in the watershed of the Hackensack River, which rises in Rockland County, New York, flows across the interstate boundary, and ultimately discharges into Newark Bay below Oradell, New Jersey.

Hackensack has financed and maintains its extensive water works properties in reliance, *inter alia*, on the long established common law of riparian rights, which applies in both New Jersey and New York.[1]

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1. Further insight into Hackensack's development of the Hackensack River basin, and related riparian rights and regulatory problems, is given by the following published judicial decisions: ***Rockland*** *County Anti-Reservoir Association* v. *Duryea,* 282 App. Div. 457, 123 N.Y.S. 2d 445 (3d Dept. 1953) [affirming New York State's permit allowing construction of Deforest Lake Reservoir and allocating certain flows to Hackensack in New Jersey]; *Spring Valley Water Works and Supply Co.* v. *Wilm,* 14 A.D. 2d 658, 218 N.Y.S. 2d 800 (3d Dept. 1961) [affirming New York State's permit allowing the Village of Nyack to divert from the Hackensack River in New York, but noting that the Village's taxing power is sufficient to indemnify Hackensack for any injury occasioned by the Village's diversion]; *Hackensack Water Co.* v. *Village of Nyack,* 289 F. Supp. 671 (S.D. N.Y. 1968) [denying Hackensack's motion for partial summary judgment in an "inverse condemnation" action for damages against the Village as a result of the Village's diversion. The action was later settled during trial before Judge Weinfeld. Under the settlement,

Hackensack, being a private riparian owner located on the Hackensack River downstream in New Jersey, finds the Second Circuit's decision in *Canfield,* review of which is herein requested, to be unprecedented, contrary to expectations, and unsettling, to say the least. Hackensack submits that because riparian rights are interests in land, a taking, in whole or in part, of those interests for public use requires the payment of just compensation, whether or not the taking was caused by a diversion in an upstream state, or in the same state in which the private riparian resides. Accordingly, Hackensack's interest in this petition is to assure that investment in riparian property is protected. Hackensack believes that the Second Circuit's decision, if not reversed, will result in substantial needless litigation and controversy in the future, and could frustrate future development of needed public water supplies.

Statement

The salient features of the decisions below are described in the Statement of the Case provided in petitioners' brief at page 4 to page 8. That discussion need not be repeated here.

The question presented has extremely important ramifications, not only regarding the security of existing riparian property, but also with respect to the financing of new water supply development throughout the northeastern United States which is badly needed in the near future.[2]

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the Village agrees to pay Hackensack for water diverted in excess of certain amounts as provided in the agreement between the parties. See also *Juzek* v. *Hackensack Water Company,* 48 N. J. 302, 225 A. 2d 335 (1966), relating to condemnation of watershed lands for water supply purposes in New Jersey.

2. *See* Northeastern United States Water Supply Study, Summary Report, North Atlantic Division, U.S. Army, Corps of Engineers, New York, N.Y. (July, 1977).

ARGUMENT

I

AN ALLOCATION OF RIVER FLOW BETWEEN STATES BY AN EQUITABLE APPORTIONMENT DECREE OF THE SUPREME COURT DOES NOT DEPRIVE INJURED DOWNSTREAM RIPARIANS OF THEIR CONSTITUTIONAL RIGHT TO COMPENSATION

The Second Circuit's decision, reversing the award of damages for a taking of private riparian property, is clearly in error and should be reversed.

The District Court correctly found that plaintiffs Canfield, *et al.,* as riparian owners, enjoyed property rights, just as owners of land in fee simple enjoy property rights (450 F. Supp. at 861-4; App. at pp. 52a-69a). The District Court further found that plaintiffs' property had been taken for a public use by reason of New York City's upstream diversion, and awarded money damages (450 F. Supp. at 873-6; App. at 111a-137a). Thus, the District Court properly treated the matter as an inverse condemnation claim.[3]

While the Supreme Court's equitable apportionment of the Delaware River's flow[4] settled the allocation of water among quasi-sovereign riparian states, such apportionment did not destroy the constitutional right of Pennsylvania riparians to recover money damages which they actually suffered and were able to prove as a consequence of New York's diversions (450 F. Supp. at 866-7; App. at p. 78a-79a). Hackensack submits that an allocation of flow between adjacent states is only an allocation. Whether such

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3. See *Ferguson* v. *Village of Hamburg,* 272 N.Y. 234 (1936); *Westphal* v. *City of New York,* 177 N.Y. 140 (1904); and *New York City* v. *Pine,* 185 U.S. 93 (1902).

4. See *New Jersey* v. *New York,* 283 U.S. 336 (1931); *New Jersey* v. *New York,* 347 U.S. 995 (1954).

an allocation is made by Supreme Court decree[5], or by unilateral decision of an upstream state with which the downstream state tacitly agrees,[6] the question of whether damages must be paid to riparians in a downstream state is not part of the decision to allocate. Such question may only be decided if and when actual damages occur and can be proved.[7] Accordingly, the District Judge's analysis in *Canfield* was correct and in accordance with long established precedents.

The Second Circuit, on the other hand, ruled that the Supreme Court's equitable apportionment of the Delaware deprived downstream riparians of their right to compensation. The Second Circuit reasoned that to require payment of damages to riparians in Pennsylvania:

> "... would hobble or possibly even destroy the effect of Supreme Court decrees or Congressionally approved interstate water compacts by subjecting those who rely upon the provisions of the decrees or interstate compacts to unreasonable damage burdens" (606 F.2d at 366; App. at 16e).

The Second Circuit's reasoning appears to be premised on two obviously false propositions. The first is that an apportionment decree or an interstate compact imposes an affirmative requirement to develop a water supply. However, an apportionment is only an allocation of the flow, not a directive to take riparian property without paying damages.

5. *Id.;* see also *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931).

6. See *Rockland County Anti-Reservoir Association* v. *Duryea, supra,* approving a state administrative agency's allocation of the Hackensack River's flow between New York and New Jersey.

7. See *Spring Valley Water Works and Supply Co.* v. *Wilm, supra; New York* v. *Illinois,* 274 U.S. 488 (1927); *New Jersey* v. *Sargent,* 269 U.S. 328 (1926); and *McCann* v. *Chasm Power Co.,* 211 N.Y. 301 (1914).

The Second Circuit's next proposition is that the City would be subjected to "unreasonable damage burdens" if it had to pay for its taking of riparian property in Pennsylvania.[8] This reasoning defies logic, precedent, and common sense. New York City, like cities elsewhere in the northeast, routinely pays compensation upon condemnation of private riparian rights, just as it does when condemning private lands for highways, parks, and other public facilities.[9] The Second Circuit had no basis upon which to conclude that the City's damage burden to Pennsylvania riparians would be "unreasonable". It further had no basis to conclude that the right of Pennsylvania riparians to compensation was destroyed by the Supreme Court's equitable apportionment decree.[10] Moreover, private riparians are barred by the Eleventh Amendment from appearing in equitable apportionment proceedings in the Supreme Court's original jurisdiction to protect their private interests (see *New Jersey* v. *New York,* 345 U.S. 369 (1953)).

8. Compare *Spring Valley Water Works and Supply Co.* v. *Wilm, supra,* where it was held that a Village's taxing power was sufficient to indemnify a downstream riparian in another state if damages were proved.

9. See *Matter of Van Etten* v. *City of New York,* 226 N.Y. 483 (1919); *Ferguson* v. *Village of Hamburg, supra; Smith* v. *City of Rochester,* 92 N.Y. 463 (1883); *New York* v. *Pine, supra; Adams* v. *Greenwich Water Company,* 138 Conn. 205, 83 A.2d 177 (1951); *Sparks Mfg. Co.* v. *Town of Newtown,* 57 N.J. Eq. 367, 41 A. 385 (Ch. 1898); *Mayor, etc. of City of Paterson* v. *East Jersey Water Co.,* 74 N.J. Eq. 49, 70 A. 472 (1908), *aff'd.* 77 N.J. Eq. 558, 78 A. 1134 (E&A 1910).

10. See *Hughes* v. *Washington,* 389 U.S. 290 (1967), at 298: The Constitution forbids a retroactive transformation of private into public property by judicial decree (concurring opinion of Stewart, J.).

II

PRECEDENT REQUIRES PAYMENT OF MONEY DAMAGES TO PRIVATE RIPARIANS IN A DOWNSTREAM STATE WHEN THEY ARE INJURED BY DIVERSIONS IN AN UPSTREAM STATE

The Second Circuit ignored its own precedent, *Pine* v. *Mayor, et al. of City of New York,* 103 Fed. 337 (C.C. S.D. N.Y. 1900), *aff'd.* 112 Fed. 98 (2d Cir. 1901), *rev'd. as to decree sub nom. New York* v. *Pine,* 185 U.S. 93 (1902). *Pine* was an equity action commenced by Connecticut riparians to enjoin diversions by New York City for public water supply from the Byram River which rises in New York and flows into Connecticut. The Circuit Court ordered an injunction against the City, unless the parties settled by a given date as to the amount of compensation to be paid. The Supreme Court reversed as to the decree reasoning that the conditional injunction gave Pine an unfairly superior bargaining position, and remanded with instructions to enter a decree providing for the ascertainment of damages.

Another diversion suit involving private riparians in different states is *Manville Co.* v. *City of Worcester,* 138 Mass. 89 (1884). In that case, plaintiff owned a mill in Rhode Island on the Blackstone River. Defendant City diverted water from a tributary upstream in Massachusetts. The Supreme Judicial Court of Massachusetts, per Holmes, J., held that plaintiff could recover damages notwithstanding that his mill was situated in Rhode Island. He reasoned that there was a concurrence of the domestic law of both states as to the illegality of an uncompensated diversion, and that, therefore, the liability could be enforced in either state.[11]

11. Accord: *Banigan* v. *City of Worcester,* 30 Fed. 392 (C.C.D. Mass. 1887).

The *Manville* case was followed by the Supreme Court in *Bean* v. *Morris,* 221 U.S. 485 (1911), in which Justice Holmes affirmed a lower court's order awarding appropriations among interstate private parties on the same basis as if they had been located in the same state.

The Second Circuit refused to follow these precedents. The Second Circuit further erroneously interpreted *Hinderlider* v. *LaPlata,* 304 U.S. 92 (1938), in which injunctive relief only was requested. The case did not involve a claim for damages.[12]

Accordingly, the Second Circuit erred by failing to recognize that the riparian rights laws of New York and Pennsylvania, being in concurrence, require that money damages be paid to downstream riparians who can prove actual damages.

12. See the Petition for a Writ of Certiorari at 19-20.

CONCLUSION

The Second Circuit's decision holds that this Court's equitable apportionment decrees in *New Jersey* v. *New York* operate to confiscate private property. This unprecedented result plainly warrants this Court's attention and the petition for a writ of certiorari should be granted. The Second Circuit's error, if not rectified, will likely result in substantial future uncertainty and litigation. Amicus respectfully requests that the Court consider granting certiorari, reversing the judgment of the Court of Appeals on the basis of the District Court's exceptionally lucid opinion, and remanding for further proceedings.[13]

Respectfully submitted,

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13. Cf. *Crown Simpson* v. *Costle*, — U.S. — , No. 79-797 (March 17, 1980).